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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.M. et al., Persons
Coming Under the Juvenile
Court Law.

B291742
(Los Angeles County
Super. Ct. No. DK18021A,
DK18021B)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

C.M. et al.,

Defendants and
Appellants.

APPEAL from orders of the Los Angeles Superior Court,
Michael E. Whitaker, Judge. Affirmed, but conditionally
remanded.

Janette Freeman Cochran, for Defendant and Appellant
Cristina M.

Daniel G. Rooney, for Defendant and Appellant Eugene M.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Sarah Vesecky, Senior Deputy
County Counsel, for Plaintiff and Respondent.

In this juvenile dependency case, the juvenile court (1) sustained a supplemental petition seeking to modify the placement of two young children by alleging, among other things, that mother had violated an earlier juvenile court order and (2) removed the children from both parents. The parents appeal these orders and also assert that the court did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). Only the ICWA claim has merit. Accordingly, we affirm but conditionally remand for further proceedings in compliance with ICWA.

FACTS & PROCEDURAL BACKGROUND

I. As Relevant to Substantial Evidence Challenge

A. *Initial assertion of jurisdiction*

Cristina M. (mother) and Eugene M. (father) have two daughters together, A.M. (born 2012) and D.M. (born 2015) (collectively, the children).

In June 2016, the Los Angeles County Department of Children and Family Services (the Department) filed a petition asking the juvenile court to exert dependency jurisdiction over the children on the ground that father's drug abuse "endanger[ed] the children's physical health and safety and place[d] the

children at risk of harm” (rendering jurisdiction appropriate under Welfare and Institutions Code section 300, subdivision (b)(1)).¹ The petition did not allege any lapse by mother.

In August 2016, father entered a no contest plea to the allegation, and the trial court sustained the petition and exerted jurisdiction over both children. The court placed the children in the home of both parents, and ordered enhancement services for both parents.

B. *Supplemental petitions*

1. *Against father*

In December 2017, the Department filed a petition under section 387 to remove the children from father’s custody based upon several failed drug tests. The court sustained the petition and removed the children from father, but allowed them to remain in the home of mother. The court ordered that father may have monitored visits, but explained to both parents that father was “not to live with the child[ren].” Mother also said that she “underst[oo]d” that she was not to monitor father’s visits.

2. *Against mother and father*

In May 2018, the Department filed a petition under section 342 alleging that (1) mother has “a history of illicit drug use and is a user of methamphetamine,” which renders her “incapable of providing regular care and supervision [of] the children”; (2) father did not protect the children from mother’s drug use; and (3) mother “on multiple occasions” “violated the order of the Juvenile Court that stated the children were only to have monitored visitation with the father.” The petition further

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise instructed.

alleged that these actions placed the children at substantial risk of serious physical harm.

The Department filed this petition in response to an incident in early April 2018. Mother had invited father to stay with her and the children at a motel and, after two days, disappeared for two days to start an extramarital affair with a methamphetamine dealer. Mother's extended visit with the dealer ended when the dealer was arrested by police after she was observed loading a bag containing methamphetamine and paraphernalia related to its use into his car. Subsequently, father twice told the Department that he "presume[d]" mother had been using "crystal meth," but also recanted both reports. Mother was a "no show" at subsequent random drug tests. Father and mother each admitted that father's stay in the hotel room with the children violated the juvenile court's order, and A.M. reported that father had made similar visits many times in the past and that those visits were supposed to be a "secret."

After re-designating the May 2018 petition as one filed under section 387 (rather than section 342),² the court sustained all of the allegations following a contested hearing. The court then removed the children from both parents.

II. Specifically, as to ICWA

Mother denies any Native American ancestry. Father provided information that he might have heritage from two Native American tribes. In June 2016, he indicated that the paternal great grandfather may have Indian ancestry, and eventually referred the Department to the paternal great aunt for "more information." The great aunt reported that she was one-

² The court also dismissed the Department's December 2017 petition at its request.

eighth Choctaw, but refused to provide the Department with any further information. Father subsequently indicated that he may be related to a “Cherokee tribe in Oklahoma through” the paternal great-grandmother.

The juvenile court orally indicated it was not making a definitive ruling about the applicability of ICWA, but the court’s minute order reflected an order that ICWA did not apply.

The Department took no action to notify any Indian tribe.

III. Notice of Appeal

Each parent filed a timely notice of appeal.

DISCUSSION

I. Substantial Evidence Challenge

The Department may file a petition under section 387 in order to “allege[] new facts or circumstances” showing that a child already subject to the juvenile court’s jurisdiction has not been effectively protected by the court’s previous dispositional orders, and thus requires a different placement. (§ 387, subds. (a) & (b); Cal. Rules of Court, rule 5.560(b)(1).) In ruling on such a petition, the juvenile court must (1) “follow[] the procedures for [a] jurisdictional hearing[] and mak[e]” findings regarding (a) “the factual allegation[s]” and (b) the “ineffective[ness]” of the “prior disposition[al]” order, and then (2) “follow[] the procedures for [a] dispositional hearing[] to determine whether removal is appropriate.” (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 542.)

Mother challenges both the first portion of the juvenile court’s order sustaining the factual allegations involving her in the May 2018 petition and the second portion of the juvenile court’s order removing the children from parental custody. We review each of these challenges for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633.)

A. *Factual allegations and effectiveness of prior disposition*

Substantial evidence supports the juvenile court's finding that the factual allegations regarding mother's violation of the juvenile court's prior visitation order are true. Mother and father both admitted to violating the order, and A.M. indicated that they had done so many times in the past. What is more, the result of mother's violation was to leave two small children in the custody of the parent whom the court had previously determined posed a substantial danger to their health and safety due to his prior drug abuse issues. This placed the children at risk. (E.g., *In re John M.* (2012) 212 Cal.App.4th 1117, 1125 [violation of a juvenile court order may place a child at risk warranting exertion of jurisdiction].) This is sufficient to establish the truth of the Department's factual allegations as well as to show that the prior dispositional order—allowing mother to have custody of the two children—was ineffective to protect those children.

Mother resists this conclusion.

With respect to whether she violated the juvenile court's order in the first place, mother argues that hers was a one-time lapse and was only for a few hours. However, father's and A.M.'s statements are to the contrary and by themselves constitute substantial evidence. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1101 ["The testimony of a single witness can provide substantial evidence"].) Also, the juvenile court specifically found that A.M.'s statements regarding the frequency of father's visits "to be more credible than mother's and father's . . . denials." We cannot second guess that credibility finding. (*Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54, 64.) Mother further contends that the court's order that father was not to visit the children with only mother as the

monitor suffered from “some ambiguity.” It did not. Indeed, mother herself had no difficulty telling the court that she “underst[ood]” its meaning after the court reviewed it with her.³

With respect to whether leaving the children in father’s sole care placed the children at risk of harm (and simultaneously whether the prior dispositional order was inadequate because it made it possible for mother to do so), mother asserts that the children were really not at risk because the Department itself was, at that time, already inclined to ask the juvenile court to terminate dependency jurisdiction. However, the Department’s inclination does not change the fact that mother ignored the visitation order that was in effect at the time and that, in doing so, she placed the children at risk. Father’s request to his relative and then the Department for help in caring for the children after mother did not return for two days is further proof that leaving them in his custody placed them at risk. In the same vein, mother asserts that the juvenile court’s order gave the Department discretion to allow for unmonitored visitation and highlights her testimony that she promised in the future “to confirm whether the Department had modified the orders.” Again, however, the Department never exercised its judicially conferred discretion and never told mother that it had; mother

³ In light of the ample evidence supporting the juvenile court’s findings on this ground, we need not consider whether substantial evidence supports the additional factual allegations regarding mother’s drug use. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [“if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence[,] . . . the reviewing court need not consider whether any or all of the alleged statutory grounds for jurisdiction are supported by the evidence”].)

simply violated the court order she had told the court itself she understood.

B. *Removal*

Substantial evidence also supports the juvenile court's removal of the children from mother's and father's custody. Removal is appropriate only if clear and convincing evidence supports a finding that (1) "[t]here is or would be a substantial danger . . . to the . . . minor if the minor were returned home," and (2) "there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1).) For the same reasons outlined above supporting the juvenile court's findings with regard to the Department's factual allegations and the inadequacy of the prior dispositional order, there is also substantial evidence that the children would be in "substantial danger" if allowed to remain in mother's and father's custody and that means short of removal would be insufficient. In sum, father's inability to care for the children and mother's unwillingness to follow court orders specifically designed to protect them from father demonstrate that further court orders short of removal will likely prove ineffective in protecting the children. Mother's suggestion that the children could safely remain with her as long as she had an updated safety plan ignores mother's demonstrated inability to follow the juvenile court's orders.

II. ICWA

IWCA was enacted to curtail "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) Under

ICWA and the California statutes our Legislature enacted to implement it (§§ 224-224.6), a juvenile court—and, as its delegate, the Department—have (1) a duty to investigate whether a child is an “Indian child” and, if the court “knows or has reason to know” that she is, (2) a duty to notify the child’s parent and either the Indian child’s tribe or, if the tribe is unknown, the Secretary of the Interior and the Bureau of Indian Affairs. (25 U.S.C. § 1912(a); see also 25 U.S.C. § 1903(11); §§ 224.2, subd. (d)(4) & 224.3, subds. (a), (c) & (d); Cal. Rules of Court, rule 5.481(a).) The duty to notify is triggered if a parent reports possible Indian heritage with a particular tribe. (*In re D.C.* (2015) 243 Cal.App.4th 41, 60 [citations omitted]; see, e.g., *In re N.G.* (2018) 27 Cal.App.5th 474, 481 [father’s report that child “may have Cherokee ancestry through ‘the Cherokee tribe’” triggers notice]; *In re B.H.* (2015) 241 Cal.App.4th 603, 607 [father’s naked assertion of lineal Cherokee descent triggers notice]; *In re B.R.* (2009) 176 Cal.App.4th 773, 785 [father’s claim that his adopted father was one-fourth Apache triggers notice].)

Father and his aunt advised the Department or juvenile court that he (and, by extension, the children) may have Indian heritage through the Choctaw and Cherokee tribes. As the Department concedes, this was sufficient to trigger the duty to notify the affected tribes to give them the opportunity to ascertain whether the children are “Indian child[ren]” within the meaning of ICWA. (25 U.S.C. § 1903(4); §§ 224.1, subd. (a) & 224.3, subd. (a)(3); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165.) Accordingly, we conditionally remand the matter to the juvenile court for the Department to give notice to the applicable tribes while leaving all remaining orders intact unless and until those tribes determine that the children qualify as Indian

children and are thereafter invited to participate in the proceedings. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.)

DISPOSITION

The juvenile court's orders sustaining the supplemental May 2018 petition and removing A.M. and D.M. from their parents are conditionally remanded, and the court is directed to properly comply with the notice provisions of ICWA. If, after proper notice, the court finds that A.M. and D.M. are Indian children, the court shall proceed in conformity with ICWA. Otherwise, the court's orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST